

APPEAL NO. 051934  
FILED OCTOBER 3, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 28, 2005. The hearing officer resolved the disputed issues by deciding that: the respondent 1/cross-appellant (carrier) waived the right to contest compensability of the cervical spine, right shoulder, right and left knees, and lumbar spine (Conclusion of Law No. 3) by not timely contesting the conditions in accordance with Sections 409.021 and 409.022; that the carrier did not waive the right to dispute whether the \_\_\_\_\_, compensable injury extended to left shoulder, right knee/arthritis, and chronic pain; and that the appellant/cross-respondent's (claimant) \_\_\_\_\_, compensable injury includes injuries to the lumbar spine, both knees, chronic pain, and left wrist but does not include injuries to the cervical spine, bilateral shoulders, and right knee arthritis (Conclusion of Law No. 6). The carrier appealed, arguing that the hearing officer failed to make findings in accordance with the issues as modified at the CCH, and that Conclusion of Law No. 3 and Conclusion of Law No. 6 cannot be reconciled. The carrier additionally disputed the hearing officer's adverse waiver determination and the determination that the compensable injury extends to include the left wrist. The claimant responded, urging affirmance of the determinations disputed by the carrier. The appeal file does not contain a response from the respondent 2 (sub-claimant). The claimant also appealed, disputing the determination that the carrier did not waive the right to dispute whether the compensable injury extended to the left shoulder, right knee/arthritis, and chronic pain and the finding that the right knee arthritis, bilateral shoulders, and the cervical spine are not results naturally flowing from the \_\_\_\_\_, injury. The appeal file does not contain a response from the sub-claimant. The carrier responded, urging affirmance of the determinations and findings disputed by the claimant.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The extent of the compensable injury and whether or not the carrier waived the right to contest the compensability of the claimed injury were at issue.

**MODIFIED ISSUE REQUEST**

The carrier stated at the CCH that it filed a response to the benefit review conference (BRC) report and represented that it accepted a low back strain/sprain and a right knee meniscal tear. The carrier requested that the issue be rephrased to identify the specific body parts with respect to the low back and right knee that the carrier did not accept. After a brief discussion, the claimant stated that she did not want to get a ruling on the low back and be required to have a new hearing on a specific disc bulge.

The claimant then stated that in the interest of addressing all issues she would have no objection to rephrasing the issue. The hearing officer then asked the sub-claimant if it was present only to address the issue regarding chronic pain. The hearing officer then responded, "okay, go ahead." Although the parties agreed to revise the issues, no specific conversation took place on the record concerning the specific language to be used modifying the issues, nor was it clear if both the extent and the waiver issues were to be modified. We note that the carrier's response to the BRC report was not offered or admitted into evidence by either party nor was it included in the record as a hearing officer exhibit. The carrier contends in its appeal that the hearing officer failed to make findings in accordance with the issues as modified at the CCH. The decision and order does not contain modification of the issues from those listed in the BRC report other than the addition of the left wrist to the extent-of-injury issue. We remand this case back to the hearing officer to reform the issue as agreed by the parties. Since there was not a clear understanding of the parties and the hearing officer as to what the specific issues to be decided were, the parties will be allowed to present evidence and argument at the CCH on remand. There are other matters of concern regarding the hearing officer's decision and order regarding waiver and inconsistent Conclusions of Law.

## WAIVER

Section 409.021, effective for a claimed compensable injury that occurred before September 1, 2003, provides that an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Department of Insurance, Division of Workers' Compensation (Division) and the employee in writing of its refusal to pay benefits. In Appeals Panel Decision (APD) 030380-s, decided April 10, 2003, the Appeals Panel noted that in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court stated: "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability."

It appeared to be undisputed that the carrier received first written notice of the injury on October 10, 2002. The hearing officer noted in the Background Information portion of his decision that "[f]airly read, the carrier's October 11, 2002, [Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21)] neither states that it is refusing to pay benefits because it denies compensability, nor states that it will pay benefits as required by the Act when due, and is therefore an insufficient filing within the seven days to extend the 'waiver' period under the Appeals Panel decisions construing Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002) for an \_\_\_\_\_, date of injury." This is error. The TWCC-21 dated October 11, 2002, stated:

- "(1) the carrier is continuing to investigate the claim under the Texas Labor Code Section 409.021(c); (2) **benefits are available and will be paid in accordance with the Texas Workers' Compensation Act, however, it does not appear that any benefits are due at this time;** (3) the carrier reserves the right to

dispute compensability/liability in accordance with Section 409.021(c) and the Texas Workers' Compensation Act. (emphasis added)"

It is clear from the TWCC-21 in evidence dated, October 11, 2002, that the carrier agreed to pay benefits as due while they continued to investigate this claim. The copy in evidence is not a complete copy and does not indicate whether or not the box in the upper left hand corner certifying benefits will be paid as accrued was checked. It does contain language that the carrier will pay benefits in accordance with the 1989 Act. However, there is no indication that this was filed or transmitted to the Division as a "cert 21". There was no other evidence offered at the hearing to demonstrate that the carrier took some action within the seven day period after receiving first written notice of the injury. On remand, the hearing officer must determine what the waiver period is. See APD 041738-s, decided September 8, 2004. The nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period.

### **INCONSISTENT CONCLUSIONS OF LAW**

We note that Conclusion of Law No. 3 and Conclusion of Law No. 6 contained in the decision and order are inconsistent. The hearing officer concluded that the carrier waived the right to contest compensability of the cervical spine but then concluded that the compensable injury does not include injuries to the cervical spine. Additionally, the hearing officer concluded the carrier waived the right to contest compensability of the right shoulder but then concluded the claimant's compensable injury does not include the bilateral shoulders. If the carrier waived the right to contest compensability of the cervical spine and right shoulder, the cervical spine and right shoulder are part of the compensable injury as a matter of law.

We remand this case back to the hearing officer to reform the issue as agreed to by the parties and make new findings of fact and conclusions of law on the issues as reformed. Since the issues are being reformed the parties should be given an opportunity to present evidence and make arguments.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division of Hearings pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge